IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 5TH NOVEMBER 2007 / 14TH KARTHIKA 1929

CRL.A.No. 977 of 2007(B)

SC.250/2005 of ADDL. SESSIONS COURT (ADHOC)-I, KALPETTA

.....

APPELLANT: PETITIONER/ACCUSED

RAVEENDRAN @ MANIAPPAN,
S/O.UNNI ASARI, C.NO.3185,
CENTRAL PRISON, KANNUR.

BY ADV. ADV.V.MANOJ KUMAR(STATE BRIEF)

RESPONDENT/STATE:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO.977 OF 2007

Dated this the 5th day of November, 2007

JUDGMENT

This appeal is filed against the judgment in Sessions Case No.250 of 2005 on the files of the Additional Sessions Court (Ad hoc)-I, Kalpetta. The appellant faced trial for the offences punishable under Sections 376(f) read with Section 511 and 377 I.P.C.

2. The prosecution case against the appellant - accused was that on 5.5.2005 at 1 p.m. the accused attempted to commit rape on PW.4, his own daughter aged 7 years in the bed room of House No.KP.2/74 situated at Nelliyambam, Nadavayal amsom within the limits of Kamblakkad Police Station and thereby committed the offences mentioned above. To prove the charge against the appellant - accused, the prosecution examined PWs.1 to 8 and produced Exts.P1 to P6 and MOs.1 and 2. No oral or documentary evidence was adduced on the side of the defence. On closing the prosecution evidence, the accused was questioned under

Section 313 Cr.P.C. The accused denied the incriminating circumstances and stated that the case was foisted against him by PW.3, his second wife. He further stated that he fell in love with PW.3 who was his brother's wife's sister and whose husband had left her and that he married her when she became pregnant. He also stated that he had three children including PW.4 in the second marriage. He further stated that he had not committed any offence as alleged by the prosecution. However, after considering the entire evidence, the trial court found the appellant guilty under Sections 376(f) read with Section 511 and Section 377 I.P.C., convicted him thereunder and sentenced him to undergo rigorous imprisonment for five years each and to pay a fine of Rs.20,000/- each and in default of payment of fine, to undergo rigorous imprisonment for a further period of one year each for the offences under Section 376 read with Section 511 and Section 377 I.P.C. The substantive sentences were ordered to run consecutively. The accused was also given the benefit under Section 428 Cr.P.C. The trial court also ordered that the fine amount of Rs.40,000/-, if realized, shall be deposited in a nationalized bank in the name of PW.4, the victim.

3. The appeal is filed through the jail authorities and the appellant is defended by a State Brief. This Court head the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has raised the following contentions in challenging the judgment of the trial court: (i) the trial court committed serious error in believing the evidence of the prosecution witnesses to find the appellant guilty of the charge as there are circumstances to show that the evidence of PWs.3 and 4 is not reliable, (ii) the trial court committed serious error in recording the evidence of PW.4, a child aged seven years and that the procedure adopted by the trial court to record the evidence of PW.4 is not in accordance with the provisions of the Indian Evidence Act, 1872, (iii) the evidence of PWs.3, 5and 6 would show show that the case was foisted against the appellant by PW.3 with an ulterior motive to take vengeance on him and (iv) the finding of the trial court that the appellant attempted to commit rape on PW.4 is not supported by any medical evidence and that there was also delay in reporting the matter to the police.

5. Before answering the contentions raised by the learned counsel appearing for the appellant, it is only proper for this Court to look into the background of the case. The appellant married PW.3 , his brother's wife's sister at a point of time when she and her child were neglected by her husband. It has also come out in evidence that the appellant who was

already married was compelled to marry PW.3 as she was carrying his child. In that marriage, three children were born, PW.4 being the eldest. The incident as alleged by the prosecution happened on 5.5.2005 at 1 p.m. It was the prosecution case that the appellant bathed PW.4 and allowed her to sleep on his cot and thereafter he removed her undergarment upto her knees and placed his private parts in between her thighs. It has also come out in evidence that eight days after the incident when PW.3 and the appellant were talking in the presence of PW.4, the child told PW.3 that the appellant was not a good person and that when PW.3 questioned her, she revealed to her all that had happened on 5.5.2005. Thereafter, the matter was reported to the police on 20.5.2005 after consultation with PW.6, a lawyer, PW.4 was sent to PW.1 for medical examination and crime was registered against the appellant. PW.8 was the then Sub Inspector of Police who conducted investigation of the case and filed the final charge against the appellant.

6. The main contention of the learned counsel appearing for the appellant is that the trial court ought not to have placed reliance on the evidence of the prosecution witnesses, especially PW.4, the victim, PW.3, her mother and PWs.5 and 6. In this context, it is only proper to see the evidence of PW.4 first. This witness was a child of seven years, just

promoted to the second standard. As per Section 118 of the Indian Evidence Act, 1872, when a witness is brought before the court, it is the duty of the court to find out whether the witness is competent to give evidence before a court of law. A perusal of the evidence of PW.4 and the preliminary examination of the child would show that the method adopted and the procedure followed by the trial court are not satisfactory. When a specific question was put to her regarding the class in which she was studying, she stated that she was studying in the second standard. She also stated that being a Saturday, she had no class. Two other questions put to her and the answers given to those questions are as follows:(Q) ഇപ്പോൾ എവിടെയാണ് മോൾ നിൽക്കുന്നത്? (A) അറിയില്ല. (Qഇവിടെ എന്തിനാണ് വന്നതെന്ന് അറിയാമോ? (A) ഇല്ല.The trial court had also recorded as follows:

> "I am satisfied that the child is a competent witness to give evidence. She was questioned by the Bench Clerk Sri. Poulose."

The trial Judge was not in a position to ascertain the competency of the child to speak the truth or to give evidence in a criminal case. When cross-examined, this witness stated that പപ്പാ ഇങ്ങനെ ചെയ്തു എന്നു കദീജ ആന്റിയോടും ഏലിക്കുട്ടി ചേച്ചിയോടും സിസിലി വക്കീലിനോടും, പോലീസിനോടും ഒക്കെ

പറയണമെന്ന് അമ്മയാണ് എനിക്ക് പറഞ്ഞ് തന്നത് . It is further recorded in the evidence that the child nodded her head positively when she was asked whether പപ്പ അങ്ങനെ ചെയ്തിട്ടുണ്ടോ? From the evidence of this witness, it is not possible to say that she was telling the truth before the court. In the decision reported in **Narayan Kanu Datavale v. State of Maharashtra, 1997 Cri. L.J. 1788,** a Division Bench of the Bombay High Court had taken the view that the evidence of a child witness should be accepted only after the greatest caution and circumspection. The Bombay High Court held as follows in paragraph 12 of the above judgment:

> "..... It is well settled that the testimony of a child witness should only be accepted after the greatest caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about things which he has not seen, and once having been tutored, he goes on repeating in a parrot like manner what he has been tutored to state. ....."

It is also elicited from the evidence of PW.4 that she did not like the appellant and was afraid of him as he used to come home drunk and quarrel with PW.3, his wife.

7. It is also not possible to hold that PW.3 was not having any

grudge against the appellant. Though PW.3, the wife of the accused and the mother of the victim had given evidence before the court that she was not keeping any animosity towards the appellant, she admitted in cross-examination that the appellant was plannng to give his property to his first wife and the children born in that marriage. She also admitted before the court that her husband had not revealed his age at the time of their marriage and that she was aged 30 during the relevant time. These things may not be of much relevance. Her married life was spoken to be a happy one. The evidence of this witness would also show that she filed the complaint before the police after consultation with PW.6, a lawyer and that too after fifteen days of the incident. The evidence of PWs.5 and 6 would show that they had advised PW.3 to file the complaint before the police. PW.1, the doctor who examined the victim stated that no injuries were noted on the body of the victim and that there were no signs of violence of resistance. He also stated that there was no complaint of pain by the child. Another aspect to be noted is the evidence of PW.8, the Sub Inspector of Police, Kamblakkad who conducted investigation of the case. He admitted that MOs.1 and 2, the nighty the undergarment respectively, alleged to have been worn by the victim during the relevant time were not sent for chemical examination as he was told that the above material objects were washed twice. That is not a reason for not sending the same

for chemical examination. It is also to be noted that even according to PW.4, the appellant had removed her undergarment upto her knees and did something which she could not explain and which was explained by her mother. This also is a reason for rejecting the evidence of the prosecution. The trial court relied on three judgments of the Apex Court reported in **Bhoginbhai Hirjibhai v. State of Gujarat, A.I.R. 1983 S.C. 753, Madan Gopal Kakkad v. Naval Duvey (1992) 3 S.C.C. 204** and **State of Himachal Pradesh v. Asha Ram, A.I.R. 2006 S.C. 381.** In the above three decisions, the evidence given by the witnesses were different form the evidence proved before the court. Hence, the judgments relied on by the trial court are not applicable to the facts of the present case.

8. In the above circumstances and on an overall appreciation of the entire evidence, this Court is of the view that the finding entered by the trial court is not justifiable and that the prosecution has not succeeded in proving the charge against the appellant. The impugned judgment is accordingly set aside and the appellant - accused in Sessions Case No. 250 of 2005 on the files of the Additional Sessions Court (Ad hoc)-I, Kalpetta is acquitted of the charges levelled against him. The appellant shall be released forthwith, if he is not wanted in connection with any other case.

The Crl. Appeal is accordingly allowed. Before parting with the judgment, I record my appreciation for the persuasive arguments advanced by Sri. V. Manoj Kumar, learned counsel appearing for the appellant which helped in deciding the case.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.977/2007

JUDGMENT

5th NOVEMBER, 2007